Protection Ordinance (Cap: 14) as it is not in respect of a neglect....in the execution of a public duty or authority.

I am nevertheless constrained to point out the peculiar situation which arises under this Ordinance if an action is brought for an act done in the execution of the public duty or authority or in respect of neglect in the execution of such duty or authority. In such a case sub-section 1 and sub-section 3 must be read together, and the Plaintiff must allege that the defendant acted maliciously and without reasonable and probable cause and if he fails to prove the same the judgment must be given against him.

If the action is for an act done in the execution of a public duty, then the proof that the defendant acted maliciously and without reasonable and probable cause must inevitably prove that the act was not done in execution or even intended execution of a public duty. *Newell* v. *Starkie* 89 L.J., P.C. 1, referred to in *Scammell* v. *Hurley*, (1929) 2.K.B. 419. If the action is for a neglect in the execution of a public duty, it is impossible even to prove that the omission was done maliciously and without reasonable and probable cause As this standard of proof is in such an action unattainable the action cannot be brought at all. If one accepts neglect as meaning an act of negligence how can a plaintiff prove that the act of negligence was performed maliciously and without reasonable and probable cause. He is quite ready to prove "a violation of a legal right in particular circumstances." But he is to go further and prove that in failing to take care the defendant acted maliciously and without reasonable and probable cause. Negligence is the failure to exercise proper care in doing an act one is lawfully entitled to do. Acting maliciously in the legal sense is acting wrongfully, intentionally, and without lawful justification and excuse. None the less the plaintiff has to prove that the defendant, in doing an act he is lawfully entitled to do, did it without lawful justification, that is that he had no legal right to do the act at all.

Even taking maliciously in the limited sense it is used in the action for malicious prosecution, as spite or indirect and improper motives, it is impossible to prove that a driver who is a perfect stranger to you acted maliciously in driving his lorry into your vehicle.

The result is that a public body is, by this Ordinance, in cases falling within sub-section one, made a judge in its own cause. If it thinks fit to pay damages, it may; if it thinks not, it need not. There is no legal compulsion to pay, and no appeal against a refusal. Public opinion or the sympathy of individual members of the public body may have some effect upon the matter; and, presumably, a public body, if satisfied that the claim is a just one, would make an *ex gratia* payment; but, as such bodies are custodians of public funds, and, as it is not easy for any employer to judge whether his servant has been negligent or not, the public body is thus placed in an invidious and an anomalous position. I say, anomalous, because it appears that a statutory entity such as a public authority created by Ordinance has a greater protection than has the Colonial Government itself. [*Att: Gen: of S.S.* v. *Pang Ah Yew*, (1925) A.C. 55.]

Such is not the case under the English Act. The protection there given is reasonable.

It is difficult to understand how sub-section 3 got into this Ordinance at all and is in my opinion an unnecessary section.

Judgment accordingly.

Solicitor for the plaintiff—*S. Fung.*

Solicitors for the defendant—

Drew & Napier.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, AG. C.J.

August 12, 1937

THAM SEOW HING (M.W.) v. CHOP KWONG FATT CHEONG.

[SINGAPORE SUIT No. 128 of 1937]

Principal and agent—trading firm—local branch, a purchasing and forwarding agency—manager accepting deposits—absence of authority—deposit receipts — chop or seal — ostensible authority—absence of benefit to firm.

The manager of the Singapore branch of a firm in Kuala Lumpur accepted two deposits from the plaintiff and in exchange gave her two receipts chopped with the seal of the firm. The manager's duties were to make purchases from traders in Singapore and forward the goods to Kuala Lumpur, to arrange for the dispatch to Kuala Lumpur of goods purchased from China, and send up-country goods which the head-office had sold in other centres. Three times a month the head office remitted moneys by means of drafts to the agent to enable him to pay for the goods purchased in Singapore and such drafts were paid into an account at a local bank upon which the agent was authorised to draw. It was in evidence that the agent had no authority to borrow on behalf of the firm and that the firm at all material times was never in financial difficulties. The books of the firm contained no record of any loans or of the deposits said to have been made by the plaintiff. In an action to recover the amounts deposited:—

Held that the mere possession of the seal did not extend the agent's actual, implied or ostensible authority to borrow money, when such borrowing was not necessary for the firm's business.

A. T. K. P. L. Palaniappa Chettiar v. *Chop Nam Kee*, (1913) S.S.L.R. 6 applied.

Held further that inasmuch as it was not established that the firm had benefited by the agent's borrowings, the plaintiff was not entitled to recover.

TRIAL OF ACTION.

The facts and arguments appear sufficiently from the judgment below.

Chong Thutt Pitt for the plaintiff.

Mallal for the defendants.

Cur. Ad. Vult.

TERRELL, AG. C. J.—The Plaintiff is a singing girl and sues on two deposit receipts, each for $2,500, and alleged to have been given in respect of moneys deposited by her with the defendant firm on the 26th June, 1934, and the 1st July, 1935, respectively. At all material times one Wong Yoke Man was the manager of the defendant firm in Singapore.

The headquarters of the firm are in Kuala Lumpur. It is a prosperous and old established business which has apparently never been in financial difficulties. There are five partners of whom Wong Yoke Man's father is one.

The Singapore branch was merely a purchasing and forwarding agency. The Manager's duties were to make purchases from traders in Singapore, and forward the goods to Kuala Lumpur, to arrange for the forwarding to Kuala Lumpur of goods purchased from China, and to send up-country goods which the head office had sold in other centres. Three times a month the agent received drafts to enable him to pay for the goods purchased in Singapore, and such drafts were paid into an account at the Overseas Chinese Bank upon which the agent had power to draw.

The agent's powers were not defined by any agreement in writing, nor did he have a power of attorney from the partners. According to the evidence of Wong Fook Whye, the manager of the head office in Kuala Lumpur, the Singapore agent had no authority to borrow money. I accept this evidence without hesitation in view of the fact that for the purpose of the business of the Singapore branch, borrowing would never be necessary, and that the books of the firm contain no record of any loans or of the deposit receipts upon which the Plaintiff sues. An agent, unlike a partner, has no implied authority to borrow money unless it is necessary for the purpose of his duties, and there was no evidence that the agent had been held out as having any such authority. It is true that Wong Yoke Man did borrow money and used the firm's name on other occasions, but there is no evidence that the Plaintiff knew of these other borrowings, or relied on the apparent scope of the agent's authority. The partners certainly did not know, and as I have said no entry of these transactions was made in the firm's books. Wong Yoke Man merely kept a record on slips of paper for his own information.

The fact was that Wong Yoke Man, who held a very responsible position as manager of the Singapore branch, was expected to maintain himself with his wife and family of three children on a salary of $45 a month. This he was quite unable to do, and used the firm's moneys for his private expenses. When the time came to pay the firm's debts he had to borrow money to make up his defalcations and then borrowed more money to meet his previous commitments when they fell due. For the purpose of these borrowings he used the firm's chop. One of the lenders, one Ang Kai Pan, a rice and steamer merchant, advanced money on the security of Promissory Notes. He made no inquiries as to whether Wong Yoke Man had any authority to borrow—he merely "looked to the seal." But the mere possession of the seal does not extend an agent's actual, implied or ostensible authority to borrow money, when such borrowing is not necessary for the firm s business. [See *A. T. K. P. L. Palaniappa Chetty* vs. *Chop Nam Kee*, (1913) S.S.L.R. p.6 and the judgment of Sproule J. at p.10.].

The only point which caused me any difficulty was the argument that the Chop had benefited by these borrowings, and that accordingly the Plaintiff was entitled to recover to the extent of such benefit, even if the borrowing was outside the scope of the agent's authority. [See *Reversion Fund and Insurance Company, Limited* v. *Maison Cosway Limited*, (1913) 1 K.B., p.364]. But when the facts of the present case are examined it will be seen that the Chop did not benefit in any way from the agent's borrowings. It would have been different if the borrowings had been made for the purpose of liquidating trade debts for which the Chop would in any case be liable, but that was not the position. The agent was indebted to the Chop, not the Chop to the agent. When the agent borrowed money in the name of the firm to reduce his own indebtedness, he did not relieve the firm of any existing liability. On the contrary he sought to impose a fresh liability which did not previously exist. The principle therefore of a lender recovering to the extent of the benefit enjoyed by an unauthorised agent's principal, does not apply.

In the result therefore the Plaintiff's claim fails and must be dismissed with costs.

Action dismissed.

Solicitors for the Plaintiff—
Shelley-Thompson & Demuth.

Solicitors for the Defendants—
Mallal & Namazie.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., THOMAS, C.J. (F.M.S.) and HOWES, J.

August 9, 1937

ALKAFF & COMPANY.....Appellants.

v.

THE GOVERNOR-IN-COUNCIL & ORS.

Respondents.

Writ of Certiorari—Backlane Orders—Report by Commissioner of Lands—Allegations of bias.

The Commissioner of Lands is an *ex officio* member of the Singapore Improvement Trust. Upon application made by the Singapore Improvement Trust, the Governor-in-Council appointed the Commissioner of Lands to